Notes

Hahn v. Superior Court: Failing to Take the Doctrine of Strict Premises Liability to Its Logical Conclusion

In Hahn v. Superior Court, *a California court has once again refused to apply* Becker v. IRM Corp.*'s strict liability rule to commercial establishments. The crucial fact in* Becker, *the existence of a warranty of habitability, is not present in* Hahn, *said the court. But as this Note shows, defective commercial establishments place the public in as much risk of harm as manufacturers of defective products. If the strict liability policy considerations of accident reduction and risk distribution have any meaning, they are clearly applicable to commercial licensors of defective premises, such as Hahn. The* Hahn *court's reluctance to so hold is another example of courts' unwillingness to take the doctrine of strict premises liability to its logical conclusion.*

I. Introduction and Summary

Twentieth century tort law has seen the expansion of liability to categories of defendants who were traditionally immune. Reforms began early in the century with the landmark decision of *MacPherson v. Buick Motor Co.*,[1] in which a manufacturer of an automobile was held liable for injuries resulting from a defective wooden wheel despite the absence of privity between him and the injured party. In

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

the years that followed, the principles of negligence were increasingly broadened to promote the compensation of victims,[2] and plaintiff-oriented doctrines, such as *res ipsa loquitur*, began to be more aggressively applied.[3] Departures from the general rules limiting liability were not confined to the area of products, but were recognized in other domains. Significant inroads to the age-old principle that possessors of land were generally immune from liability had already been made[4] when the California Supreme Court held in *Rowland v. Christian*[5] that landowners and occupiers owed a general duty of care to all who entered their property.

These developments eventually led the California Supreme Court in *Greenman v. Yuba Products, Inc.*[6] to hold manufacturers strictly liable for injuries resulting from defective products. Twenty-two years later, in *Becker v. IRM Corp.*,[7] residential landlords were also held to be strictly liable for injuries caused by latent defects in the leased premises. In the meantime, strict liability was applied to all those who were part of the marketing chain of products.[8] The doctrine of strict liability seemed boundless. But this was soon to change. In *Murphy v. E.R. Squibb & Sons, Inc.*,[9] service providers were excluded from the doctrine's purview. And since *Becker*, no California court has applied the doctrine of strict liability to any other type of landowner or occupier. The pendulum is swinging back toward limiting strict liability.[10]

This Note argues that the development of the doctrine of strict premises liability was arrested prematurely, that in their effort to curb the tide of plaintiff compensation, the courts in California have overlooked the logic and strong policies favoring the extension of strict liability to commercial establishments which attract the public. This issue is discussed in the context of a recent case, *Hahn v. Superior Court*,[11] in which the Court of Appeals for the Fourth Circuit held that the doctrine of strict liability was not applicable to the owner of a shopping mall.

Part II of this Note presents and analyzes the facts of *Hahn* and

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2. *See* Rose v. Melody Lane, 39 Cal. 2d 481, 247 P.2d 335 (1952).
3. *See* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Newing v. Cheatham, 15 Cal. 3d 351, 540 P.2d 33, 124 Cal. Rptr. 193 (1975).
4. *See* Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944); Hansen v. Richey, 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (1965).
5. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
6. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
7. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).
8. *See infra* notes 106-07 and accompanying text.
9. 40 Cal. 3d 672, 710 P.2d 247, 221 Cal. Rptr. 447 (1985).
10. *See generally* FOWLER V. HARPER ET AL., THE LAW OF TORTS (1956).
11. 1 Cal. App. 4th 1448, 3 Cal. Rptr. 2d 502 (1991).

its holding. The analysis shows that the *Hahn* court's decision to apply *Brown v. San Francisco Ball Club, Inc.*[12] was misguided. Part II then examines the *Hahn* court's rationale for restricting the *Becker* decision to residential landlords and finds it unpersuasive. While commercial landlords such as Hahn are not held to a warranty of habitability, the same policy considerations which supported the imposition of strict liability in *Becker* strongly support the extension of strict liability to Hahn. As a commercial landlord in control of a defective common area open to the public, Hahn should have been held strictly liable for the injuries incurred by plaintiffs on his premises.

Part III argues for a broader proposition: that Hahn should also have been strictly liable as a licensor of a defective premise open to the public. In reaching this conclusion, Part III examines the decision in *Garcia v. Halstead*,[13] in which a licensor of a defective product was subject to strict liability. It also argues against the views expressed in *Prosser and Keeton on the Law of Torts*[14] to show why the policies of strict liability require that all commercial licensors of defective products or premises should be included under the strict liability umbrella. Lastly, to identify the limits of strict premises liability, Part III discusses the importance of a defect in the premises and the business establishment's relation to the public as requirements for the doctrine. In brief, not all licensors of premises should be held strictly liable for injuries due to defects, but just those, such as restaurant and shopping mall owners, who license their premises to the public.

II. HAHN V. SUPERIOR COURT

A. Factual and Procedural Background

In *Hahn v. Superior Court*,[15] plaintiffs Martin and Rogers sustained injuries when a tree fell on them while they were having lunch in an outdoor courtyard.[16] Martin and Rogers had purchased their lunch from the Farmer's Market, a restaurant located in a

12. 99 Cal. App. 2d 484, 222 P.2d 19 (1950).
13. 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).
14. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 104, at 719 (5th ed. 1984).
15. 1 Cal. App. 4th 1448, 3 Cal. Rptr. 2d 502 (1991).
16. *Id.* at 1450, 3 Cal. Rptr. 2d at 502-03. The court opinion did not elaborate on the extent of plaintiffs' injuries.

shopping mall in San Diego.[17] Defendant Hahn, owner of the restaurant and the shopping mall, provided the chairs and table where plaintiffs were seated.[18]

Martin and Rogers each filed a suit for negligence, later adding a cause of action for strict liability. Their separate actions were consolidated for trial. Before trial, Hahn moved to demur the strict liability cause of action; the trial court overruled the demurrer, and Hahn appealed.[19] The next section discusses the results of this appeal.

B. The Hahn *Court's Decision and Rationale*

The court recognized that the sole issue before it was whether defendant Hahn could be held strictly liable in tort for the injuries suffered by plaintiffs Martin and Rogers.[20] In reaching its decision to deny the strict liability cause of action, the court discussed the doctrine of strict liability as applying only to producing and marketing enterprises responsible for placing products in the stream of commerce.[21] It held that with respect to premises liability, the landmark decision of *Rowland v. Christian*[22] applied: whether the landowner "in the management of his property 'has acted as a reasonable man in view of the probability of injury to others.' "[23] However, because Martin and Rogers were invitees, having been expressly or implicitly invited by Hahn to enter the shopping mall for his advantage, the governing principle was that of *Brown v. San Francisco Ball Club*.[24] The *Hahn* court noted that in *Brown*, the property owner was held not to be an insurer of the invitee's safety but was nevertheless required to "use reasonable care to keep the premises in a reasonably

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 1452, 3 Cal. Rptr. 2d at 504.
22. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
23. *Hahn*, 1 Cal. App. 4th at 1450, 3 Cal. Rptr. 2d at 503 (quoting Rowland v. Christian, 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104). In *Rowland*, plaintiff, a social guest of defendant, was injured in defendant's apartment when the handle of the bathroom faucet cracked in his hand. The defendant had notified the lessor of the broken handle, but failed to inform plaintiff of the danger before he entered the bathroom. The court held that when an occupier of land is aware of a concealed condition which may pose an unreasonable risk of harm to those coming into contact with it, failing to warn of the danger or to make adequate repairs can constitute negligence. In so holding, the *Rowland* court abolished the long-standing common law tradition of treating possessors of land as a special category of defendant, one whose duty of care shifted with the status of the injured party. No longer would the liability of landowners or occupiers turn on whether the injured party was a trespasser, a licensee, or an invitee. Henceforth, all land owners or occupiers would be held to a single duty of reasonable care in all circumstances. See *infra* notes 41-44 and accompanying text for more details on the *Rowland* decision.
24. 99 Cal. App. 2d 484, 222 P.2d 19 (1950).

safe condition and warn of any latent or concealed peril."[25]

The court in *Hahn* next addressed plaintiffs' contention that the rule in *Becker v. IRM Corp.*[26] applied.[27] It recognized that in *Becker*, the California Supreme Court held that a residential landlord was strictly liable in tort for the injuries caused by latent defects in the premises existing at the time of leasing.[28] Nevertheless, the *Hahn* court declared that "[t]here is no basis to extend the *Becker* rationale to commercial premises liability."[29] In so holding, the *Hahn* court characterized the decision in *Becker* as one which was based on "the theory of an implied warranty of habitability and the need to provide safe, urban housing to the public."[30] Because defendant Hahn was not in the business of leasing residential property to the public, nor of producing or distributing goods found in the stream of commerce, he could not be strictly liable for plaintiffs' injuries.[31] As a commercial landlord "holding its premises open to the public," Hahn was subject to the traditional rule requiring that some measure of fault exist before liability is imposed.[32] The *Hahn* court concluded that *Becker* does not "require or portend" that strict liability apply to all invitees who are injured in the common areas of commercial establishments, including supermarkets, restaurants, theaters, and department stores.[33]

The court in *Hahn*, however, did agree with plaintiffs that the two

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25. *Hahn*, 1 Cal. App. 4th at 1450, 3 Cal. Rptr. 2d at 503 (citing Smith v. Kern County Land Co., 51 Cal. 2d 205, 208, 331 P.2d 645 (1959); Brown v. San Francisco Ball Club, 99 Cal. App. 2d at 486, 222 P.2d at 20). In *Brown*, plaintiff was struck and injured by a baseball at a baseball stadium. In finding the defendant not liable, the court held that the duty of a proprietor or operator of a stadium toward his patrons is met when he provides as many screened seats as patrons may reasonably be expected to call for on any ordinary occasion. *Brown*, 99 Cal. App. 2d at 488, 222 P.2d at 21. See *infra* notes 48-52 and accompanying text for additional details regarding the facts of the case, the court's holding, and the applicability of the *Brown* court's decision in *Hahn*.

26. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

27. *Hahn*, 1 Cal. App. 4th at 1451, 3 Cal. Rptr 2d. at 503.

28. *Id.* In *Becker*, plaintiff tenant was injured when he fell through an untempered glass shower door. *Becker*, 38 Cal. 3d at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214. Both plaintiff and defendant agreed that the risk of injury would have been substantially reduced had the shower door been made of tempered glass. Undoubtedly, this supported the extension of strict liability to defendant landlord. *Id.* See *infra* text accompanying notes 73-89 for a thorough analysis of the *Becker* decision and why it should apply in *Hahn*.

29. *Hahn*, 1 Cal. App. 4th at 1452, 3 Cal. Rptr. 2d at 504.

30. *Id.* (citing *Becker*, 33 Cal. 3d at 462-65, 698 P.2d at 120-23, 213 Cal. Rptr. at 217-20.)

31. *Id.*

32. *Id.*

33. *Id.*

cases constituting the relevant precedent in this area, *Muro v. Superior Court*[34] and *Pierson v. Sharp Memorial Hospital, Inc.*,[35] were distinguishable from *Hahn*.[36] In both of these cases, the courts refused to extend strict liability beyond the landlord-tenant relationship, though for different reasons. In *Muro*, the court emphasized the fact that plaintiff was an employee of the commercial tenant,[37] and in *Pierson*, the court characterized defendant hospital as a service provider, not subject to strict liability.[38] In contrast, plaintiffs

34. 184 Cal. App. 3d 1089, 229 Cal. Rptr. 383 (1986). In *Muro*, plaintiff employee slipped and fell on stairs in the commercial building where he worked. The stairs were allegedly defective because they were slippery and no runner was on the flooring to prevent people from falling. The trial court sustained defendant's demurrer on the strict liability cause of action without leave to amend, and plaintiff appealed. *Id.* at 1091-92, 229 Cal. Rptr. at 384-85.

35. 216 Cal. App. 3d 340, 264 Cal. Rptr. 673 (1989). In *Pierson*, plaintiff brought causes of action for negligence and strict liability against Sharp Memorial Hospital for injuries she incurred at the hospital. While visiting her husband, a patient of defendant hospital, plaintiff fell due to an allegedly defective carpet. The trial court granted defendant's motion for non-suit on the negligence claim and her motion to strike the strict liability claim. Plaintiff appealed, challenging the ruling on the strict liability cause of action. *Id.* at 342 & n.1, 264 Cal. Rptr. at 673-74 & n.1.

36. *Hahn*, 1 Cal. App. 4th at 1451, 3 Cal. Rptr. 2d at 504.

37. *Muro*, 184 Cal. App. 3d at 1089, 229 Cal. Rptr. at 383. In declining to extend the strict liability rule articulated in *Becker* to lessors of commercial real property, the *Muro* court acknowledged that residential landlords could be held strictly liable for injuries incurred in a defective common area. Because they have a duty to inspect common areas under their control and because the implied warranty of habitability covers common areas, landlords cannot be excused from strict liability for lack of actual knowledge of the defect. *Id.* at 1092, 229 Cal. Rptr. at 385. For an analysis of the *Muro* court's decision and *Muro's* applicability in *Hahn*, see *infra* text accompanying notes 90-98.

38. *Pierson*, 216 Cal. App. 3d at 346, 264 Cal. Rptr. at 676. Plaintiff contended that the hospital should be held strictly liable because it was "part of the enterprise of producing and marketing hospital rooms to the public." *Id.* at 342, 264 Cal. Rptr. at 674. The court disagreed. In reaching the decision not to extend the doctrine of strict liability to the defendant hospital, it reviewed cases which declined to impose strict liability on service providers, including Murphy v. E.R. Squibb & Sons, Inc., 40 Cal. 3d 672, 710 P.2d 247, 221 Cal. Rptr. 447 (1985) (pharmacist); Pena v. Sita World Travel, Inc., 88 Cal. App. 3d 642, 152 Cal. Rptr. 17 (1978) (travel agent); Shepard v. Alexian Bros. Hosp., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973) (hospital furnishing blood to patients); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971) (hospital furnishing surgical needle to surgeon). These cases, the court noted, stood for the proposition that strict liability does not apply to transactions where the "primary objective is obtaining services" or to situations where the service aspect of the transaction "predominates" and the sale of the product is "merely incidental to the provision of the service." *Pierson*, 216 Cal. App. 3d at 344-45, 264 Cal. Rptr. at 675. Quoting yet another case, Gagne v. Bertran, 43 Cal. 2d 481, 489, 275 P.2d 15, 21 (1954), the court emphasized that those who hire service providers should not expect perfection but only reasonable care. Service providers have a duty to exercise reasonable care in their profession, and should they fail to discharge that duty, they are liable under negligence law. *Pierson*, 216 Cal. App. 3d at 345, 264 Cal. Rptr. at 675. The *Pierson* court also reviewed the law on strict products liability, *id.* at 344, 264 Cal. Rptr. at 675, and on strict premises liability, *id.* at 343-344, 264 Cal. Rptr. at 674. With respect to *Becker*, it quoted *Muro's* ruling that " '*Becker* was intended to be restricted to landlords of residential property. There is no public policy rationale warranting the extension of *Becker* beyond its obvious intent.' " *Pierson*, 216 Cal. App. 3d at 343-44, 264 Cal. Rptr. at 674 (quoting *Muro*, 184 Cal. App. 3d at 1089, 229 Cal. Rptr. at 389). As will be shown,

here were invitees of Hahn, not employees, and the restaurant and shopping mall were establishments which are not immune from strict liability since they could not be characterized as service providers. Martin and Rogers therefore contended that they were more like plaintiff tenant in *Becker*, powerless to protect themselves from the latent defects existing in Hahn's property.[39] They further contended that strict liability should be imposed on Hahn because, like the landlord in *Becker*, Hahn was in a better position to inspect for defects and bear the cost of injuries resulting from the defects.[40] The court, however, did not agree with either of these contentions. Instead, the *Hahn* court held firm to the bright line rule distinguishing landlords of residential housing from landlords of commercial realty.

C. *Analysis*

1. *The* Brown *Rule Is Inapplicable in* Hahn

In *Rowland v. Christian*,[41] the California Supreme Court abrogated the common law rule which based liability on the status of the injured party to establish that landowners owed a general duty of care to all who entered their premises.[42] The status of the injured party—invitee, licensee or trespasser[43]—was only one of a number of

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however, a strong case can be made for imposing strict liability for injuries caused by defective premises on commercial establishments open to the public. *See infra* text accompanying notes 106-39.

39. *Hahn*, 1 Cal. App. 4th at 1451, 3 Cal. Rptr. 2d at 504.

40. *Id.*

41. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

42. *Id.* at 118-119, 443 P.2d at 568, 70 Cal. Rptr. at 104. It is interesting to note that in reaching its decision, the *Rowland* court relied on § 1714 of the California Civil Code, which declares that

> "[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

Id. at 111-12, 443 P.2d at 563-64, 70 Cal. Rptr. at 99-100 (quoting CAL. CIV. CODE § 1714). Although this particular code was enacted as early as 1872, it appears that *Rowland* was the first time the California Supreme Court considered it in determining a landowner's duty of care. One can only speculate as to why it took the court more than ninety years to give effect to the code if, as the court seems to imply, it served as "the foundation for our negligence law." *Id.*

43. *Rowland* defines these terms as follows:

> Generally speaking a trespasser is a person who enters or remains upon land of another without a privilege to do so; a licensee is a person like a social guest who is not an invitee and who is privileged to enter or remain upon land by virtue of the possessor's consent, and an invitee is a business visitor who is invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with the business dealings between them.

factors which may have "some bearing" on the issue of landowner's liability.[44] Yet in *Hahn*, the court declared that the applicable rule was articulated in *Brown v. San Francisco Ball Club*,[45] a case adjudicated eighteen years before the landmark *Rowland* decision.[46] In view of the *Rowland* decision that "status [of the injured party] is not determinative,"[47] the *Hahn's* court's reliance on *Brown*, a case which predicated liability on status, appears misguided.

The decision in *Brown* is inapplicable for a number of other reasons. In *Brown*, plaintiff was injured when she was hit by a baseball while she sat in an unscreened portion of the stadium.[48] The *Brown* court recognized that the owner of the property is not an insurer of the invitee's safety; nevertheless, the court also recognized that his duty was relative and depended on many factors, including "the capacity and opportunity of the invitor to protect the invitee and the capacity and opportunity of the invitee to protect himself."[49] The court further noted that, in the context of a baseball game, spectators are also participants and so assume the risk inherent in and incident to the game.[50] The risks are also commonly known or readily observable to those exercising reasonable care.[51] Based on these findings, the court held that defendant was not liable not only because

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Id. at 113-14, 443 P.2d at 565, 70 Cal. Rptr. at 101.

44. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. The court noted that the new approach to landowner or occupier liability would entail the balancing of a number of factors, including

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequence to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100.

45. 99 Cal. App. 2d 484, 222 P.2d 19 (1950).

46. *Hahn*, 1 Cal. App. 4th at 1450, 3 Cal. Rptr. 2d at 503.

47. *Rowland*, 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

48. *Brown*, 99 Cal. App. 2d at 486, 222 P.2d at 20.

49. *Id.* at 487, 222 P.2d at 20.

50. *Id.*

51. *Brown*, 99 Cal. App. at 489, 222 P.2d at 21. Plaintiff, however, contended that she was ignorant of the game of baseball. She had seen just one game, twenty-two years before the one in which she suffered her injuries, and that game had been played "in a big field, not a ball park." *Id.* at 488, 222 P.2d at 21. Plaintiff also maintained that although she had been at the game for about an hour, she had not been paying attention to it but had spent the time "visiting with a friend." *Id.* at 488-89, 222 P.2d at 21. Consequently, she had not knowingly assumed the risk of being struck by a baseball. The court was not sympathetic even though one of the elements or the defense of assumption of the risk is actual comprehension of the risk, Nunez v. R'Bibo, 211 Cal. App. 3d 559, 563, 260 Cal. Rptr. 1, 2 (1989); RESTATEMENT (SECOND) OF TORTS § 496A cmt. d (1965) ("A subjective standard is applied to assumption of risk, in determining whether the plaintiff knows, understands, and appreciates the risk."). The court held that the risks were "common knowledge" and imputed knowledge of the risks to her. *Brown*, 99 Cal. App. at 489, 222 P.2d at 21. In also noting that the risks were obvious and should

he had fully discharged his duty of care by providing an adequate number of screened seats, but also because plaintiff had knowingly assumed the risk of being hit by a baseball.[52]

In *Hahn*, however, neither Rogers or Martin assumed the risk of being hit by a tree. This particular risk is not inherent in or incident to having lunch in a courtyard of a shopping mall, nor are unsteady trees obvious or readily observable even by those exercising reasonable care. In addition, while common knowledge may inform one that trees do fall, the likelihood of such an occurrence at a carefully created and maintained environment is rather small, much smaller indeed than the possibility of being struck by a baseball in a baseball park. It is also important to note that the court in *Brown* spoke not of inflexible rules and duties, but instead made it clear that the property owner's duty of care is relative and depends on his capacity and opportunity to protect the invitee. Although the property owner is not an insurer of the invitee, he still owes a duty to keep his premises in a reasonably safe condition because he is best able to do so.[53]

Apart from noting that plaintiff was, as in *Brown*, an invitee, the *Hahn* court did not explain why *Brown*'s rule was applicable here. In view of the differences in context, type of accident and plaintiffs' abilities to either protect themselves or assume the risk, it would seem that the rule expressed in *Brown* is a rather unlikely choice. This is so even without considering that the decision in *Rowland* virtually repudiated the common law classification scheme or at least considerably reduced its significance in determining a landowner's duty of care.

2. Becker's *Strict Liability Rule Should Apply in* Hahn

The court in *Hahn* decided not to include commercial lessors under *Becker's* strict liability umbrella primarily because, in *Becker*, strict liability was founded on the theory of an implied warranty of habitability.[54] A close examination of the *Becker* decision reveals, however, that the *Becker* court did not base its decision entirely on the existence of a warranty of habitability, as the *Hahn* court claims. Rather, the *Becker* court used the warranty theory to support its

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have been observed by plaintiff, the court showed itself to be unwilling to let plaintiff benefit from her own failure to exercise ordinary care.

52. *Brown*, 99 Cal. App. at 488-89, 222 P.2d at 21.

53. *See id.* at 486-87, 222 P.2d at 20.

54. *Hahn*, 1 Cal. App. 4th at 1452, 3 Cal. Rptr. 2d at 504.

decision to subject landlords to strict liability. By recognizing that consumers hold warranties of merchantability, much as tenants hold warranties of habitability, the court established the link it needed to apply the strict liability principles governing the sale of products to the field of real estate transactions involving the lease of a dwelling.[55] The *Hahn* court's notion that strict liability is not applicable to landlords who are not bound by a warranty of habitability becomes all the more suspect when one considers that the policy considerations supporting *Becker's* strict liability rule also played a large role in the recognition of the warranty of habitability.

a. The Theory of an Implied Warranty of Habitability: Green v. Superior Court[56]

A review of the case in which a warranty of habitability was first implied reveals how significant the policy considerations of strict liability were to the making of that decision. In *Green v. Superior Court*,[57] the court began its discussion by pointing out the parallels in development between the "factual changes in the landlord-tenant field" and the "equally dramatic changes in the prevailing legal doctrines governing commercial transactions."[58] The latter developments, it noted, have led courts, "[i]n seeking to protect the reasonable expectations of consumers," to discard the *caveat emptor* approach in favor of a warranty of fitness and merchantability and, in recent years, to imply a warranty of fitness in contracts for the construction of new housing.[59]

The court then compared the modern tenant with the modern consumer, underscoring the similarities in position between tenants and consumers on the one hand and marketers of personalty and landlords on the other. In so doing, it pointed out that "[i]n most significant respects, the modern urban tenant is in the same position as any

55. *See Becker*, 38 Cal. 3d at 459-65, 698 P.2d at 119-23, 213 Cal Rptr. at 216-20.

56. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

57. The *Green* case involved an unlawful retainer action. The landlord filed suit in small claims court seeking possession of the leased premises and back rent in the amount of $300. The tenant acknowledged that he had not paid the rent, but defended his position on the grounds that the leased premises were uninhabitable. The court granted possession of the premises to the landlord and entered a judgment in his favor for $225. The tenant appealed, and a superior court heard his case de novo. The court stated that the repair and deduct provisions of the civil code, Cal. Civ. Code § 1941, constituted plaintiff's exclusive remedies and held for the landlord, affirming the small claim court's judgment. Plaintiff again appealed, but the court of appeals denied the writ. Finally, the supreme court heard the case and overturned the lower courts' holdings, establishing for the first time an implied warranty of habitability for residential leases in California. *Id.* at 620-22, 517 P.2d at 1170-72, 111 Cal. Rptr. at 706-08.

58. *Id.* at 626, 517 P.2d at 1174, 111 Cal. Rptr. at 710.

59. *Id.*

other normal consumer of goods."[60] By way of a residential lease, "a tenant seeks to purchase 'housing' from his landlord for a specified period of time."[61] The landlord, in turn, is in a similar position as any normal marketer of goods: the landlord "sells" housing to the tenant, "enjoying a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building."[62] Thus, the court concluded that "[a] tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit."[63] And so a tenant's expectations, like the expectations of consumers, are entitled to formal legal protection.

The court in *Green*, however, did not base its decision to imply a warranty of habitability in leases for dwellings entirely on the similarity in position between tenants and consumers. It also pointed to the geographic and economic changes that have taken place in the landlord-tenant relationship. As opposed to his agrarian counterpart, who primarily acquired an interest in land, the modern urban dweller contracts for a place to live.[64] The complexity of modern apartment buildings, moreover, "renders them much more difficult and expensive to repair . . . but also makes adequate inspection of the premises by a prospective tenant a virtual impossibility; . . . and the landlord, who has had experience with the building, is certainly in a much better position to discover and to cure dilapidations in the premises."[65] In contrast, the urban dweller, unlike the "jack of all trades" farmer, lacks the incentive, the skills, and the wherewithal to maintain the premises.[66] Indeed, given the enormous transformation in the housing market brought about by urbanization and population growth, modern-day tenants have "little bargaining power through which they can gain express warranties of habitability from landlords."[67] Finally, the shortage of housing leaves tenants with "no realistic alternative[s]," rendering inadequate the few common law remedies available to them.[68]

But the court's discussion of these developments actually supports

60. *Id.* at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708.
65. *Id.* at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.
66. *Id.* at 624-25, 517 P.2d at 1173, 111 Cal. Rptr. at 709.
67. *Id.* at 625, 517 P.2d at 1173, 111 Cal. Rptr. at 709.
68. *Id.* at 625, 517 P.2d at 1174, 111 Cal. Rptr. at 710.

, the argument that in deciding to recognize the warranty of habitability, the *Green* court was guided by the same policy concerns which led to the earlier adoption of strict products liability. The *Green* court spoke of the inability of the modern tenant to inspect and repair his apartment much as Justice Traynor spoke of the consumer as no longer having the means or skill to investigate for himself the soundness of a product when he first introduced the doctrine of strict products liability in *Escola v. Coca Cola Bottling Co.*[69] To the same

69. 24 Cal. 2d 453, 467,150 P.2d 436, 443 (1944) (Traynor, J., concurring). Although Justice Traynor wrote the majority opinion in Greenman v. Yuba Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the case in which the doctrine of strict liability was formally applied to manufacturers of products, he did not expound upon the reasons supporting this decision in *Greenman.* Instead, he referred the reader to his concurring opinion in *Escola,* in which he laid out the policy considerations underlying strict liability with considerable cogency. *Greenman,* 24 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

In *Escola,* plaintiff, a waitress, was injured when a Coca Cola bottle which she was moving from the case to the refrigerator broke in her hand. The defendant was a bottler who filled both new and used bottles. *Escola,* 24 Cal. 2d at 456, 150 P.2d at 437. During the trial, an expert testified about how bottles were tested by the manufacturer, stating that the test is " 'pretty near infallible.' " *Id.* at 460, 150 P.2d at 440. The bottler, however did not subject used bottles to this test, but to a visual inspection. This led the supreme court to conclude that "*if such defects do occur* in used bottles there is a duty upon the bottler to make appropriate tests before they are refilled, and if such tests are not commercially practicable the bottles should not be re-used." *Id.* at 460-61, 150 P.2d at 440 (emphasis added). The court also noted that whether the explosion was caused by an excessive charge or a defect in the glass, "there [was] a sufficient showing that neither cause would ordinarily have been present if due care had been used." *Id.* at 461, 150 P.2d at 440. The court further indicated that defendant had exclusive control over the process of charging and inspecting the bottles. Thus, all the elements of the doctrine of *res ipsa loquitur* had been met and the inference of negligence established. Defendant now had to convince the jury that he had not been negligent. Liability would attach upon his failure to dispell the inference. *Id.*

A close examination of the majority's reasoning in *Escola,* however, casts doubt on the court's conclusion. In order for the doctrine of *res ipsa loquitur* to apply, plaintiff must show that (1) the accident was of a kind that ordinarily does not occur in the absence of negligence, (2) the accident was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the accident must not have been due by any voluntary action or contribution on the part of the plaintiff. *Id.* at 457-59, 150 P.2d at 438-39. Yet in *Escola,* the facts failed to support at least the first element of the doctrine. The court actually mentioned that it was unknown whether the cause of the accident was an excessive charge or a defect in the glass. *Id.* at 461, 150 P.2d at 440. Indeed, in the indirect manner noted above, the court also acknowledged that it did not know whether used bottles even develop defects. How one can determine that an accident in which a used bottle exploded is the result of someone's negligence without knowing whether defects in used bottles can occur, let alone whether the particular bottle in question was defective, is difficult to comprehend. Moreover, nothing in the facts indicated that the bottler had been negligent in his duty to inspect the bottle visually. On the contrary, the court remarked that "defendant presented evidence tending to show that it exercised considerable precaution by carefully regulating and checking the pressure in the bottles and by making visual inspections for defects in the glass at several stages during the bottling process." *Id.* It therefore seems that the majority in *Escola* was stretching the doctrine of *res ipsa loquitur* when it held that an inference of negligence had been established by the facts of the case.

Justice Traynor clearly noticed the majority's struggle in fitting the facts in *Escola* to the doctrine of *res ipsa loquitur.* He chose to take a more direct route to establish the

effect, the *Green* court also discussed the landlord's superior position to discover and bear the cost of repairs, again much as Justice Traynor described the manufacturer's capacity to "anticipate some hazards and guard against the recurrence of others, as the public cannot."[70] While the court in *Green* did not specifically refer to Justice Traynor's strict liability policy considerations when it discussed the "enormous factual changes in the landlord-tenant field,"[71] it is evident that the rationale for strict products liability played a large role in the decision to imply a warranty of habitability, particularly in those situations where the injured party has neither the opportunity or power to protect himself.

b. The Becker *Decision and Its Policy Rationale*

In view of *Green*, it is not surprising to find that the *Becker* court relied on the warranty theory, a theory already rooted in policy, and on related case law developments to support its decision to apply strict liability. However, one should not be misled, as the court in *Hahn* was misled, by the *Becker* court's reliance on the theory of an implied warranty of habitability. Contrary to the *Hahn* court's assertion, the *Becker* court did not base its decision to transform traditional premises liability on the existence of the theory of an implied warranty of habitability. Warranties in and of themselves do not require the imposition of strict liability. To understand the rationale

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bottler's liability: "It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly." *Id.* at 463, 150 P.2d at 441. Justice Traynor went on to articulate the policy considerations supporting the imposition of strict liability:

> Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Id at 462, 150 P.2d at 440-41.

In this way, Justice Traynor set forth the twin goals of strict liability: accident reduction and risk distribution. It took another 19 years before a majority of the supreme court was ready to impose strict liability in tort on manufacturers for injuries resulting from defects in their products. But by the time the court finally made this decision in *Greenman*, the wisdom of Justice Traynor's policy considerations was widely acknowledged. *See* FOWLER V. HARPER ET AL., THE LAW OF TORTS § 28.15-28 (1956); William L. Prosser, *The Assault Upon the Citadel of Strict Liability to the Consumer*, 69 YALE L.J. 1099 (1960).

70. *Escola*, 24 Cal. 2d at 462, 150 P.2d at 440-41.

71. *Green*, 10 Cal. 3d at 626, 517 P.2d at 1174, 111 Cal. Rptr. at 710.

behind the *Becker* court's decision, one must look at the policy considerations which guided the California Supreme Court's earlier decision to impose strict products liability.[72]

The *Becker* court began its analysis of the applicability of strict liability by highlighting Justice Traynor's *Escola* opinion, in which he pointed out that " '[t]he retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product.' "[73] And later on, in discussing the case which established strict products liability, *Greenman v. Yuba Power Products, Inc.*,[74] the *Becker* court noted that the purpose of strict liability " 'is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.' "[75]

The *Becker* court next discussed the extension of strict products liability to the area of real estate, indicating that the "[a]pplication of warranty doctrine has not been limited to those engaged in commerce in personalty but has been applied where appropriate to those engaged in the real estate business."[76] In so doing, it underscored the similarities between the builders of new homes and manufacturers of products: " 'the builder or seller of new construction—not unlike the manufacturer or merchandiser of personalty—makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.' "[77] The court also underscored the similarities between the purchaser and the consumer: " 'the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a completed house and its components without disturbing the finished product.' "[78]

The court followed this with a review of several cases where the developer had been held strictly liable for a defective heating system[79] and a subsidence problem,[80] and here again, the court noted

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72. *See supra* note 69.

73. *Becker*, 38 Cal. 3d at 459, 698 P.2d at 118, 213 Cal. Rptr. at 215 (quoting *Escola*, 24 Cal. 2d at 464, 150 P.2d at 441).

74. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

75. *Becker*, 38 Cal. 3d at 459, 698 P.2d at 118, 213 Cal. Rptr. at 215 (quoting *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701).

76. *Id.* at 459-60, 698 P.2d at 119, 213 Cal. Rptr. at 216.

77. *Id.* at 460, 698 P.2d at 119, 231 Cal. Rptr. at 216 (citing Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 379, 525 P.2d 88, 115 Cal. Rptr. 648 (1974)).

78. *Id.*

79. The *Becker* court cited Kriegler v. Eichler Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969), where a builder installed a faulty heating system in one of his mass-produced homes. The builder was held strictly liable for the resulting damages.

80. The *Becker* court cited Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77

the policy concerns underlying these decisions: "the public interest dictates that the cost of injury from defects should be borne by the developer who created the danger and who is in a better economic position to bear the loss rather than the injured party who relied on the developer's skills and implied representations."[81] The *Becker* court then turned to *Green* and the doctrine of habitability. And not surprisingly, in its discussion of the theory, the *Becker* court focused on *Green's* analogy of the modern tenant to the normal consumer of goods, pointing out that "a tenant may reasonably expect that the product purchased is fit as a living unit."[82]

The *Becker* court did not end its discussion of supporting precedent with *Green.* It subsequently brought up such cases as *Fakhoury v. Magner*[83] and *Golden v. Conway,*[84] where strict liability was applied to landlords for injuries to tenants resulting from defective furnishings in the former case and a defective wall heater in the latter case.[85] The *Becker* court then concluded, noting the rationale of the foregoing cases, that a landlord is part of the " 'overall producing and marketing enterprise' " that makes housing available to lessors and should, therefore, be held strictly liable in tort for injuries resulting from a latent defect in the premises which existed at the time the premises were let to the tenant.[86]

The *Becker* court also noted that implied warranties relating to realty had long been recognized by courts.[87] Yet in doing so, it focused not on the unequal bargaining power between landlord and tenant or the scarcity of affordable housing, as the *Hahn* court implied,[88] but rather on those facets of the landlord-tenant relationship that call for the imposition of strict liability. The *Becker* court underscored the limited capacity of tenants to inspect the premises, their expectations of safety, and the landlord's ability to bear or

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Cal. Rptr. 633 (1969), where a builder was held strictly liable, this time for the subsidence caused by a defect in the preparation process of a residential lot.

81. *Becker*, 38 Cal. 3d at 460-61, 698 P.2d at 119-20, 213 Cal. Rptr. at 216-17.
82. *Id.* at 462, 698 P.2d at 121, 213 Cal. Rptr. at 218.
83. 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).
84. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).
85. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
86. *Id.* In holding that landlords are part of the chain for producing and marketing housing, the court appears to be viewing housing itself as a product and the role of the landlord as being no different from that of merchandisers of products. The court furthermore noted the extent to which landlords engage in the marketing of housing: "A landlord, like defendant owning numerous units, is not engaged in isolated acts within the enterprise but plays a substantial role." *Id.*
87. *Id.*
88. *See supra* note 30 and accompanying text.

spread the costs of injuries, the very policy reasons which led the court in *Greenman* to impose strict liability on manufacturers.[89]

c. *The Applicability of Policy, Not the Existence of a Warranty of Habitability, Should Determine Whether Strict Liability Applies*

From the foregoing analysis it should be clear that the courts in *Green* and *Becker* founded their decisions on the same public safety considerations. Thus, while the *Hahn* court and others may point out that *Becker's* application of strict liability to landlords was founded on the warranty of habitability, it was the policy reasons underlying the warranty theory, not the existence of the theory itself, which supported first, in *Green,* the adoption of the warranty theory in the context of realty and later, in *Becker*, the imposition of strict liability on landlords who are in the business of leasing residential dwellings. Indeed, in view of the similarities in policy underlying the *Green* and *Becker* decisions, the *Hahn* court's notion that strict liability is not applicable to commercial landlords because they are not bound by a warranty of habitability is difficult to understand. In *Hahn,* as in any case where the policy considerations underlying both the *Green* and *Becker* decision apply, the issue of the existence of a warranty of habitability should be irrelevant. Again this is because *Becker*'s strict liability rule was not predicated on the recognition of the theory of an implied warranty of habitability as much as on the policy considerations that supported both the theory's recognition and the imposition of strict liability. In sum, whether a lease contains a warranty of habitability should not determine whether strict liability applies. What should be dispositive is whether applying strict premises liability would further the doctrine's underlying policy considerations.

D. *Relevant Case Law and Analysis:* Muro v. Superior Court[90]

Hahn v. Superior Court is not the first case in which a court has overlooked the policy reasons underlying *Becker*'s rule of strict liability in holding that strict liability does not apply due to the lack of a warranty of habitability. In *Muro v. Superior Court*, the court reached the same decision. Although the *Muro* court recognized that strict liability applies where the injury is caused by latent defects in the common area of an apartment house,[91] it refused to extend strict

89. *Becker*, 38 Cal. 3d at 464-65, 698 P.2d at 122-23, 213 Cal. Rptr. at 219-20.
90. 184 Cal. App. 3d 1089, 229 Cal. Rptr. 383 (1986).
91. In *Muro*, plaintiff sustained an injury in a defective common area. *See supra* note 34. In an effort to have the court limit the application of strict liability to the leased premises proper, the defendant argued that a landlord is not strictly liable for injuries

liability to landlords of commercial establishments, noting that "neither the language nor the rationale of the *Becker* decision indicates any intent to apply the strict liability doctrine announced therein to landlords who lease commercial or industrial property."[92] The court in *Muro*, like the court in *Hahn*, reasoned that the *Becker* decision "was due to its previous holding that residential leases contain an implied warranty of habitability."[93] Unlike the *Hahn* court, however, the *Muro* court did not entirely ignore the policy considerations underlying the warranty doctrine and the *Becker* decision.[94] In a footnote, it expounded on this, stating that in adopting the warranty theory, the court in *Green* had based its decision on tenants' reasonable expectations of safety and their inability to inspect and

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incurred in the common areas of an apartment complex. But the court rejected this contention, stating that "[h]ad the injury here been caused by a latent defect in the common area of an apartment house, it would appear that petitioner could state a strict liability cause of action." *Id.* at 1092 n.1, 229 Cal. Rptr. at 385 n.1. Because the facts of *Muro* involved a commercial and not a residential common area, the court's statements concerning the availability of a strict liability cause of action for injuries sustained in a defective common area could be considered dicta. The logic behind the court's statements, however, cannot be contested. There is no reason why a landlord who is held strictly liable for injuries resulting from a defective apartment should not be held strictly liable for injuries resulting from a defective common area of the apartment building. A tenant's expectations of safety and of suitability of use are no different whether he is inside his apartment, just outside the front door, or on his way to it. As the *Muro* court pointed out, the civil code, CAL. CIV. CODE § 1941.1(h) (West 1985), requires stairways to be in good repair as a condition of tenantability. It also appears that this standard "is also relevant to the definition of uninhabitability." *Muro*, 184 Cal. App. 3d at 1092 n.1, 229 Cal. Rptr. at 385 n.1.

It is therefore no surprise that the court in *Hahn* seems to agree that residential landlords are subject to strict liability for injuries sustained in defective common areas. The *Hahn* court did reject plaintiff's contention that the *Muro* court recognized that a strict liability cause of action would have been "more likely to follow" had the plaintiff in *Muro* been injured by a defect in a common area controlled by the landlord. *See Hahn*, 1 Cal. App. 4th at 1451 n.2, 3 Cal. Rptr. 2d at 504 n.2. However, the *Hahn* court did not, in so doing, contest the general proposition forwarded by the *Muro* court that a landlord would be subject to strict liability in those circumstances. *See Hahn*, 1 Cal. App. 4th at 1451 n.2, 3 Cal. Rptr. 2d at 504 n.2. Other reasons, such as the fact that plaintiff in *Muro* was an employee, could have led the *Muro* court to reject the extension of strict liability to the defendant landlord in that case. The consensus of the courts thus seems to be that strict liability applies when the injury is sustained in a defective common area of an apartment building under the control of the landlord.

92. *Muro*, 184 Cal. App. 3d at 1093, 229 Cal. Rptr. at 385.

93. *Id.* at 1095, 229 Cal. Rptr. at 386-87.

94. *Id.* at 1096, 229 Cal. Rptr. at 387. The *Muro* court declared that

> [t]he policy consideration underlying the rationale of the *Becker* decision, like the rationale of the *Green* decision . . ., is the need to insure safe, adequate housing *for modern, urban residential tenants who, like ordinary consumers, are powerless to protect themselves.* The responsibility is therefore placed on the landlord, who is in a better position to bear the business costs.

Id. (emphasis added).

bear the cost of repairs.[95] Nevertheless, in the end, the *Muro* court shifted its focus back to the conditions of the housing market and the inapplicability of the warranty theory. Agreeing with two commentators of the law, the *Muro* court noted:

> This warranty [of habitability] resulted from the necessity of protecting the health and safety of residential tenants who need adequate housing in a market place where satisfactory housing is difficult to locate and the tenant is unable to protect himself because of his lack of knowledge, ability and bargaining position. These factors are not present in the leasing of nonresidential premises where the tenant is more sophisticated, his bargaining position is more equal to that of the landlord and, in the usual case, the contents of the lease, including the obligation of maintenance, are negotiated between the parties.[96]

In so holding, however, the court appears to have forgotten that petitioner was injured in a common area under the control of the commercial landlord. In addition, petitioner was not the tenant of the commercial establishment but his employee, who, like the residential tenant, lacked the knowledge, ability, and bargaining position to protect himself. Moreover, although the *Muro* court recognized that "[s]trict liability in tort applies, of course, to a bystander,"[97] it failed to show why petitioner could not be viewed as a bystander. Unlike his sophisticated employer, petitioner had not taken part in the negotiations of the lease and, like a bystander, petitioner had had little opportunity to safeguard his interests. More important, the court failed to show why bystanders who are injured in the common area of apartment complexes are more deserving of protection than bystanders who are injured in common areas of commercial complexes. In short, by focusing exclusively on the position of the commercial tenant with respect to the commercial landlord in deciding that *Becker's* strict liability rule did not apply to commercial landlords,[98] the *Muro* court missed a most significant point: the party suing was not the commercial tenant, but his powerless employee.

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95. *Id.* at 1096 n.5, 229 Cal. Rptr. at 387 n.5.

96. *Id.* at 1097, 229 Cal. Rptr. at 388 (footnotes omitted) (quoting HARRY D. MILLER & MARVIN B. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 27:75 (rev. ed. 1977)).

97. *Id.* at 1092 n.1, 229 Cal. Rptr. at 385 n.1.

98. In support of its decision, the *Muro* court indicated that "a commercial tenant cannot raise an implied warranty of habitability defense," that "there is no scarcity of commercial property," and that "commercial tenants can also absorb the costs [of injury] as a business expense." *Id.* at 1098, 229 Cal. Rptr. at 389. However, it should be noted that none of these considerations applied to the real party in interest.

E. Preliminary Conclusion: Strict Liability Should Apply to Commercial Landlords, Such As Hahn, for Injuries Resulting from Defects in the Common Areas over Which the Landlords Retain Control

While commercial leases do not contain a warranty of habitability or suitability of use, the position of commercial landlords is no different from that of residential landlords with respect to those who enter the premises. Like residential landlords, commercial landlords are part of the "overall producing and marketing enterprise" that makes commercial establishments available to commercial tenants. Commercial landlords also are in a better position to inspect for defects and to make the needed repairs than commercial tenants or their invitees since commercial establishments, like residential buildings, are complex structures whose heating, electrical, and plumbing systems may be inaccessable to them. The fact that the commercial tenant might have contracted to maintain the portion of the building which he has leased, moreover, should not release the landlord from his responsibility to assure the safety of common areas over which he has retained control, particularly when others who were not involved in the negotiations were injured. Lastly, like the residential landlord, the commercial landlord may be in a better position than his commercial tenants to spread the costs of the injuries by making price adjustments in his leases.

More important, the position of those entering commercial establishments, whether employees or invitees, is no different from the position of tenants of residential apartments with respect to strict liability. It would be difficult to argue that employees have no reasonable expectations of safety. In view of the multitude of worker's compensation acts that already hold employers strictly liable for injuries incurred by employees on the job, one must believe that employees' expectations of safety are already part and parcel of the law of torts nationwide.[99] That invitees also have expectations of safety is

99. Indeed, the development of workers' compensation acts dates back to the mid-nineteenth century when occupation injuries started to become widespread after the Civil War. The common law made defenses, such as contributory negligence and assumption of the risk, available to employers, making it difficult for a worker to recover. In the 1900s, the legislatures of various states responded by passing acts that broadened employers' liability, while in Europe, workers' compensation plans were being formulated. By the end of the 1910s, New York had passed the first compulsory coverage system. New York later amended its constitution to allow its legislature to enact a compensation system, although the system was later ruled to be contrary to the state constitution. The United States Supreme Court upheld the statute. New York Central R.R. v. White, 243

quite clear as well. Indeed, invitees' safety expectations may even be higher than the safety expectations of those entering apartment buildings, given that few customers would consider entering, let alone choose to transact business in, an unsafe environment.[100] It also cannot be denied that the success of many commercial establishments, particularly those open to the public, also depends to a significant degree on their capacity to attract customers. Whether the courts choose to recognize it, commercial establishments do and must make representations of safety to those entering their premises. Finally, those who enter commercial establishments, whether they be categorized as employees, invitees, or bystanders, are just as powerless to protect themselves against latent defects which threaten injury as any tenant or guest of an apartment complex.

The court in *Hahn*, however, like the court in *Muro*, chose not to extend the doctrine of strict liability to landlords of commercial establishments: "There is no basis to extend the *Becker* rationale to commercial premises liability."[101] Yet as has been shown above, the same policy reasons which compelled the application of strict liability on residential landlords requires the same for commercial landlords, especially in respect to common areas over which the landlord retains control. In *Muro*, strict liability should have been imposed on the commercial landlord because, as in *Becker*, the policy considerations underlying strict liability clearly called for its application.

For the very same reasons, strict liability should also have been imposed on defendant Hahn. Recall that in *Hahn*, plaintiffs Martin and Rogers were injured in a courtyard, and as the commercial landlord of the eating establishment where plaintiffs purchased their

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U.S. 188 (1917). MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 682-84 (4th ed. 1987). For more information on the history of workers' compensation, see Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967). From this it should be clear that employees expect their workplace to be free of hazards.

100. This fact has long been recognized in the common law. Prior to *Rowland*, landowners were held to the highest duty of care when an invitee had been injured. While a landowner could not wantonly or willfully injure trespassers or licensees, the latter were obliged to take the premises as they found them and could not recover for the landowner's negligence in the management of his property. But the landowner did owe the invitee the duty to exercise reasonable care to avoid injuring him, and the invitee could recover upon the landowner's failure to discharge this duty. *Rowland*, 69 Cal. 2d at 114, 443 P.2d at 565, 70 Cal. Rptr. at 101. Judicial support for the idea that invitees are owed a higher duty of care may also be observed in other, more recent opinions. Consider Judge Leventhal's concurring opinion in one of the first cases which imposed a general duty of care on landowners. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) (Leventhal, J., concurring). Judge Leventhal agreed that landowners should be held to a general duty of care, but only when business establishments are involved. *Id.* at 108. His point was that business establishments can insure the risk and pass the costs on to customers, one of the goals of strict liability. *Id.*

101. *Hahn*, 1 Cal. App. 4th at 1452, 3 Cal. Rptr. 2d at 504.

food, Hahn was responsible for the maintenance of this common eating area. As the *Hahn* court indicated, Hahn is not "in the business of leasing residential property to the general public."[102] Hahn is also not "a producer or distributor of goods."[103] Nevertheless, application of strict liability to defendant Hahn would be supported by the same considerations and would serve the same purpose as the imposition of strict liability on the residential landlord in *Becker*. Indeed, because Hahn was both the commercial lessor and the commercial landlord, the proposition noted in *Muro* that commercial landlords should not be subject to strict liability because commercial tenants are just as sophisticated as commercial landlords and have equal bargaining power is neither applicable nor persuasive here. But subjecting Hahn to strict liability would, in the words of Justice Traynor, fix responsibility where it will most effectively reduce the hazards to life and health inherent in defective premises and thus provide a safety incentive to landlords in the maintenance of their premises. Since the commercial landlord, like the residential landlord, can easily bear or spread the cost of injury by adjusting his prices or by purchasing insurance, extending strict liability to Hahn would also effectuate the "paramount policy of the strict products liability rule,"[104] the spreading throughout society of the costs of compensating defenseless victims of premises defects. Lastly, applying strict liability to Hahn and other commercial landlords would also honor customers' expectations of safety, expectations that have already received formal legal protection with respect to products and residential apartments.

This is not to say that by insisting that Hahn be held strictly liable for defendants' injuries, one also argues for the application of strict liability to "all invitees to the common areas of every commercial establishment, be it a supermarket, a restaurant, a theater or a department store, and the abolishment of the traditional requirement of some measure of fault for the imposition of liability," as the court in *Hahn* declared.[105] Although, as will be shown below, analogies may be drawn to support the application of strict liability to licensors of defective premises, the focus here is to encourage the court to eliminate the inconsistency in a body of law that holds landlords of residential apartments strictly liable for injuries resulting from latent

102. *Id.*
103. *Id.*
104. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.
105. *Hahn*, 1 Cal. App. 4th at 1452, 3 Cal. Rptr. at 504.

defects in the building's apartments and common areas, but imposes liability on commercial landlords for injuries incurred in defective common areas under their control only when negligence is proved. In view of the policy considerations behind strict liability, this inconsistency is neither warranted nor desirable.

III. License to Use and Strict Liability

A. Introduction

California courts have consistently held that the same policy considerations supporting the application of strict liability to manufacturers apply as well to all those involved in the marketing chain. But who is part of the marketing chain? In 1964 and 1965 respectively, the courts held that retailers[106] and wholesalers[107] were part of the marketing chain.[108] In 1969, lessors were included.[109] And the following year, in *Garcia v. Halsett*,[110] the courts further expanded the category to encompass those who are not directly involved in marketing but who nevertheless make products available to the public, such as licensors of products.

B. Garcia v. Halsett: *Strict Liability Applies to Licensors of Products*

In *Garcia*, an eleven-year-old boy caught his hand in a defective washing machine at a laundromat.[111] The defendant contended that the transaction between himself and the plaintiff client was a bailment, for which he was not liable.[112] The court disagreed with this

106. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

107. Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

108. Noting the courts' eagerness to apply the "twin goals of accident reduction and risk distribution to the problem of injuries caused by products," commentators of the law have described the extension of strict liability to different categories of merchants as the strict products liability "revolution," Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond* Rowland *and* Greenman, 22 UCLA L. Rev. 820, 825 (1975), and a "tidal wave, a flood, and a prairie fire," Robert E. Keeton, Venturing to Do Justice 101 (1969).

109. McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969).

110. 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

111. The defendant owner of the laundromat claimed that the machine in question was safe, but the court found ample evidence that it was defective. The machine lacked a safety "micro" switch which would have prevented the machine from starting when its door was open. At the trial, an expert testified that micro switches were commonly installed by manufacturers on washing machines as early as 1952. The machine in question was made in 1958. The court also noted that micro switches were quite inexpensive and could be installed after manufacturing was complete. After the accident, defendant had bought and installed twelve of them himself. *Id.* at 323, 82 Cal. Rptr. at 422-23.

112. *Id.* at 324, 82 Cal. Rptr. at 422. At this time, the courts had not yet applied

characterization, noting that bailment requires the delivery of the object to the bailee and that plaintiffs "assumed no responsibility for the safekeeping of the machine, and did not have the right to remove it or tamper with the mechanical parts of the washer."[113] Instead, the court characterized the transaction as a license, defining the concept as "a grant of permission to do a particular thing, to exercise a certain privilege, or to carry on a particular business or to pursue a certain occupation."[114] The licensor gives permission "to do a thing which the licensor could prevent."[115] Applying this definition to the facts of the case, the court concluded that because the owner of the laundromat implicitly gave plaintiff permission to use the machines and could have withheld that permission, plaintiff had actually acquired a license to use the machines and could not be regarded as a bailee.[116]

In discussing the applicability of strict liability, the *Garcia* court explained that the relationship between the injured party and the purveyor of the defective product has no bearing on whether the injured party can recover. Citing *Elmore v. American Motors Corp.*[117] for the rule that injured bystanders may recover under the doctrine of strict liability as victims of defective products, the court proceeded to draw an analogy between plaintiff Garcia's position and that of an innocent bystander. Like a bystander, Garcia had no control over the machines and did not have the opportunity to inspect for defects that were not apparent.[118] Garcia was actually in a worse position than a retail buyer, who generally has the opportunity to inspect the product before buying and using it. Garcia's only fault was that he selected and used a defective washing machine, and this, the court insisted, should not bar his recovery.

The *Garcia* court explained that licensors "play more than a random and accidental role in the overall marketing enterprise of the

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the doctrine of strict liability to bailors. But just three months later in Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970), the court held that there was "no significant difference between a manufacturer or retailer who places an article on the market by means of a sale and a bailor or lessor who accomplishes the same result by means of a lease." *Id.* at 253, 466 P.2d at 727, 85 Cal. Rptr. at 183.

113. *Garcia*, 3 Cal. App. 3d at 324, 82 Cal. Rptr. at 422.
114. *Id.*
115. *Id.*
116. *Id.*
117. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).
118. *Garcia*, 3 Cal. App. 3d at 325, 82 Cal. Rptr. at 423.

product."[119] They provide products "to the public for use by the public"[120] and are therefore " 'an integral part of the overall . . . marketing enterprise that should bear the cost of injuries resulting from defective products.' "[121] For this reason, the policy considerations underlying strict liability apply "logically and desirably" to licensors of products just as to manufacturers, retailers, and lessors.[122]

C. *The Views Expressed in* Prosser and Keeton: *Is a Defective Cart Like a Slippery Floor?*

Since *Garcia*, no other California court has imposed strict liability on a licensor of a defective product. But the significance of *Garcia's* ruling did not go unnoticed by commentators of the law. For example, the authors of *Prosser and Keeton on the Law of Torts*[123] (*Prosser and Keeton*) support the application of strict liability to licensors of products, but only to a certain kind of licensor. They distinguish licensors who are in the business of licensing the use of products on their premises and charge for that use from licensors whose licensing is incidental to their business and who do not charge directly for the use of the product.[124] The owner of a laundromat is an example of the former type of licensor; a grocery store owner who makes shopping carts available to his customers is an example of the latter. *Prosser and Keeton* would apply strict liability to the licensor who charges for use, the laundromat owner, because he is like a lessor of products, but not to the other type of licensor, the grocery store owner, because his transactions with customers are "quite different."[125]

Whether this difference supports application of strict liability to one type of licensor and not the other remains to be seen. But to *Prosser and Keeton*, the difference between the laundromat and the grocery cart transactions must have seemed significant and obvious. In explaining this difference, they analogize the use of grocery carts to the use of the floors in the store and contrast these two events with the laundromat situation, all in one short sentence: "there is little, if any, difference between using a defective shopping cart and using a slippery floor."[126] *Prosser and Keeton* leave one to assume

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119. *Id.* at 326, 82 Cal. Rptr. at 423.
120. *Id.*
121. *Id.* at 325, 82 Cal. Rptr. at 423.
122. *Id.* at 326, 82 Cal. Rptr. at 423.
123. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 104 , at 719 (5th ed. 1984).
124. *Id.*
125. *Id.*
126. *Id.* Thus, *Prosser and Keeton* seem to support the notion that some products, such as defective carts, should not be subject to strict liability even when used extensively by the public.

that because negligence law, rather than strict liability, applies in cases involving slippery floors, the same should hold for defective carts.

But a defective cart is not necessarily like a slippery floor. A cart can be dangerous either because of a design or manufacturing defect or because it was damaged during use. Similarly, a floor can be dangerous either because it is defective (made of a slippery material) or because a customer spilled a slippery substance on it. Thus, while a defective cart can be compared to a defective floor, there is a significant difference between a defective cart and a non-defective slippery floor. In failing to appreciate this difference, *Prosser and Keeton* compared apples and oranges and reached a faulty conclusion.

The difference between a defective cart and a non-defective slippery floor becomes particularly significant when one considers that the owner's capacity to prevent an accident varies with the source of the problem. While the store owner can clean a spill off the floor or remove a damaged cart from use,[127] he has little control over customers, who may render his store unsafe, and may be unable to act quickly enough to repair the damage and prevent an accident. In contrast, the store owner can prevent accidents that are caused by defects. He can inspect new carts for safety and take care to provide carts that are sound in design and manufacture. He can also inspect the condition of new floors to ensure that they are not slippery.

Prosser and Keeton's analogy of defective carts and slippery floors is therefore not a sound basis for distinguishing laundromat owners from grocery store owners. Defective carts and floors are like defective washing machines: they are products whose defects can cause injury. From this perspective, grocery store owners are like laundromat owners: they are both part of the marketing chain because they license the use of products to the public.

Indeed, upon close examination, there appears to be no significant transactional difference between licensors who are engaged in the very business of licensing the use of products and licensors who are not. The business type of licensor, the laundromat owner, receives payment directly from his clients for the use of his washing machines, but the non-business licensor, the grocery store owner, also receives payment: the costs of purchasing and maintaining the carts

127. If the store owner has either actual or constructive knowledge of the dangerous condition, his failure to remedy the condition in a reasonable time may subject him to liability under the principles of negligence articulated in *Rowland v. Christian. See supra* notes 41-44 and accompanying text.

and floors are included in his customers' grocery bills. While *Prosser and Keeton* may distinguish the transactions the grocery store owner and the laundromat owner have with their customers, in the end, both types of licensors have the same control over their products and derive similar benefits from their respective transactions. Both types of licensors are in the business of licensing the use of products to the public.

How defective products find their way to the public, moreover, is not a relevant factor in determining whether strict liability applies. The courts have clearly indicated this by extending strict liability to all who are part of the marketing chain, including licensors of products. Viewed from this perspective, *Prosser and Keeton*'s notion that one type should be subject to strict liability but not the other seems misguided. Factors that have no bearing on the rationale behind strict liability should not be used to determine whether strict liability should apply. Rather, the adoption of strict liability should turn on whether the injury was caused by a defect in the product and not on the kind of transaction between the licensor and the user.

D. Policy Requires That Strict Liability Should Apply to All Commercial Licensors of Defective Products

What also should be dispositive in determining whether strict liability is imposed on a particular type of merchant is whether its application would serve the twin goals of strict liability—the reduction of accidents and the distribution of risk. In the examples discussed above, it is clear that when buying products for public use, the grocery store owner, like the laundromat owner, has the choice of selecting from many manufacturers and retailers. He can choose to buy the carts or floors from a manufacturer who is concerned with product safety or from one who is more concerned with manufacturing costs. Subjecting the grocery store owner to strict liability for injuries resulting from defective carts would, as in the laundromat case, help reduce accidents by fixing responsibility "wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[128] Imposing strict liability on grocery store owners for injuries caused by defective carts would also serve the goal of risk distribution since the owner can insure the risk of injury and distribute it "among the public as a cost of doing business."[129] In sum, the social advantages of product safety and risk distribution that strict liability provides call for its imposition on all who are part of the marketing chain for a product regardless of

128. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944).

129. *Id.* at 462, 150 P.2d at 441.

whether they are in the business of providing that product or simply permit customers to use the product.

Moreover, the same legal principles that apply when a defective table causes injury at home should also apply when the same defective table causes injury in a restaurant. It makes no sense to have the imposition of strict liability depend on whether the injured party bought the product outright or simply bought the right to use it in a restaurant. In both instances, the public policy considerations of strict liability are applicable. Indeed, considering the extent to which products in commercial establishments are used, more people are likely to be injured by a defective product in a commercial establishment than in a private home. This greater risk of injury to the public makes the extension of strict liability to all commercial licensors even more warranted than to retailers of products for home consumption. In addition, when some merchants are held strictly liable but not others, some products are likely to be better tested for safety than others. Imposition of strict liability on all merchants, and thereby on all products that reach the public, would unquestionably strengthen the doctrine's effectiveness.

For these reasons, strict liability should be imposed on all licensors of defective products, including owners of grocery stores, theaters, airlines, sports facilities, and as in *Hahn*, eating areas in shopping malls and restaurants. But this is not to say that licensors of products should always be held strictly liable for injuries incurred on their premises. Negligence law should apply in accidents due to hazardous but not defective conditions in restaurants, theaters, or airplanes, as when a floor is made slippery by someone outside the licensor's control. But injuries resulting from defects in products—the tables at which people sit in restaurants or the seats they use in theaters, sports facilities, and airplanes—should be covered by strict liability.

E. Strict Liability Should Apply to Hahn as a Licensor of Defective Premises

Examining *Hahn v. Superior Court* in this light reveals that strict liability should have been applied in the case. In *Hahn*, plaintiffs' injuries occurred in a public eating area in a shopping mall, a carefully created and maintained environment. The injuries were caused by a falling tree that should have been inspected for disease or should not have been located where its fall could cause injury to innocent people. Defendant Hahn was both the owner of the shopping

mall that provided the outdoor eating area where plaintiffs were injured and the owner of the restaurant where plaintiffs bought their lunch. In either role, defendant Hahn was responsible for the defective eating area in question. The tree, like a defective cart or washing machine, was under his control. Further, no evidence was presented that indicated a customer at the shopping mall in any way contributed to the tree's falling. From this it follows that plaintiffs' injuries in *Hahn* cannot be categorized along with injuries resulting from non-defective slippery floors. Instead, *Hahn* is an example of one of a number of ways people may be injured by defective products for which they have acquired a license.

1. The Tree in Hahn *Was a Defective Product*

An opponent of extending strict liability to Hahn may argue that the fallen tree was not a product. But while the tree was not manufactured, it was grown in a nursery by or for Hahn, and Hahn did place it in an environment under his control. As with any other product, Hahn probably received an implied warranty of suitability of use when he bought the tree. He may have even replaced the tree after the accident at the expense of the seller, for Hahn would certainly not have purchased the tree had he known of the defect, just as he would not have purchased any other defective product.

An opponent of extending strict liability to Hahn may also argue that the tree was not defective. This issue was not litigated in *Hahn*, and so the court reached no conclusion regarding the reasons for its falling. But if the tree fell because of disease, then it was defective, like any product that fails to meet the purposes for which is was made and sold. The tree was, in all these respects, no different from any other product, and Hahn, as a licensor of a defective product, should not have been treated any differently than the licensor of the defective machine in *Garcia*. Rather, Hahn should have been held strictly liable for the injuries that resulted from the defective tree.

But this does not say that strict liability should apply only when the product is inherently defective. Recall that in *Becker* the untempered glass in the shower door was deemed to be defective even though officials of defendant Becker testified that before the accident in question, no one had been injured by a shower door.[130] They also testified that tempered glass may not have been available at the time the shower doors were installed in the apartment building.[131] No one was even aware that the shower doors were made of untempered

130. *Id.* at 458, 698 P.2d at 117-18, 213 Cal. Rptr. at 214-15.

131. The apartment complex in *Becker* was built in 1962 and 1963; plaintiff bought the complex in 1974. *Becker*, 38 Cal. 3d 454, 457-58, 698 P.2d 116, 117, 213 Cal. Rptr. 213, 214 (1985).

glass since they were not visibly different from shower doors made of tempered glass.[132] Despite this, the court declared that the untempered glass shower doors contained a latent defect.

The *Becker* court's decision in this regard is, however, somewhat misleading. The untempered glass shower door that caused the injury was not in and of itself defective; untempered glass is simply more fragile than tempered glass. When subjected to stress, untempered glass naturally shatters. In view of this inherent quality, the *Becker* court must have decided that untempered glass shower doors are defective not simply because they shatter, but because they put people at risk of severe injury when they do shatter. While other products may be made of untempered glass, shower doors should not be. The availability of tempered glass and the fact that the landlord could have inspected and replaced the shower doors must also have been a factor affecting the court's decision. In short, *Becker* indicates that in determining whether a product is defective, one cannot look at the product alone. One must also consider the environment in which the product is used and whether its use in that particular environment could injure innocent people.

Returning to *Hahn*, it appears clear that if the fallen tree was not diseased, it still could have contained a latent defect. A tree that is situated where its fall may cause injury to innocent people may, in light of *Becker*, be considered defective. Moreover, like the residential landlord in *Becker*, Hahn had the opportunity to inspect the tree and take action to ensure the safety of those lunching beneath it.[133] And like the untempered glass door in *Becker*, the tree should not have been located where its inherent features posed an unnecessary risk to those in its proximity.

2. *Strict Liability Should Apply to Defective Premises*

An opponent of extending strict liability to *Hahn* may further argue that Hahn is not a defective product case, but a defective premises case. This, however, should be of no consequence; whether one focuses on the product itself or the premises made defective by a

132. *Id.*

133. Hahn was actually in a better position to prevent the accident than the retailer who sold him the product: unlike the retailer, Hahn was in a position to test the product once installed. It stands to reason that if retailers are subject to strict liability despite their lack of opportunity to test products, Hahn should be subject to strict liability as well. *Escola*, 24 Cal. 2d 453, 464, 150 P.2d 436, 441-42 (1944); *see also supra* note 106 and accompanying text.

defective product within it, the results are the same: the public is at risk of injury. Moreover, as the *Becker* court noted: "The fact that the enterprise is one involving real estate may not immunize the landlord."[134] This is because "the public interest dictates that the cost of injury from defects should be borne by the developer who created the danger and who is in a better economic position to bear the loss rather than the injured party who relied on the developer's skill and implied representation."[135] Plaintiffs in *Hahn* not only acquired a license to sit at the table, they also acquired a license to use the premises on which the table was located. Like urban tenants who expect their dwellings to be in a condition suitable for use, plaintiffs, as customers of the shopping mall and restaurant, reasonably expected that they would not encounter unnecessary risks to their health and safety while shopping or eating outdoors.

Hahn also made implicit representations of safety and suitability of use to his customers. While such representations of safety are not yet formally recognized in the context of commercial establishments, Hahn is in other ways indistinguishable from the residential landlord in *Becker*. Consider that as the shopping mall owner, he is in control of the common areas of the shopping mall, much like the residential landlord who is strictly liable for injuries resulting from defective common areas. As the restaurant owner who licensed the use of the premises where plaintiffs Martin and Rogers sat, he is also not unlike the residential landlord who is held strictly liable for injuries resulting from defects in the premises he leases. While Hahn is a licensor rather than a lessor of premises, he still is in the business of making developed premises available for public use.

Furthermore, the differences between licenses and leases support rather than oppose the extension of strict liability to licensors of defective premises. Unlike the lessor, who relinquishes possession and control of the premises, the licensor merely sells a permit to use. He may at any time enter the premises himself or revoke the license, unlike the lessor, who must acquire permission from the lessee in entering the premises to effectuate repairs and must resort to the courts to evict the unruly tenant. Residential dwellings are also normally leased for extended periods of time, whereas licenses to use normally last for shorter periods of time, and the licensor regains absolute control after every use. Whether he is a laundromat owner licensing the use of washing machines or a restaurant owner licensing the use of designated areas in the restaurant, the licensor shares control of the premises during its licensed use and regains absolute control more frequently, each time a license expires. With respect to

134. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr at 219.
135. *Id.* at 460-61, 698 P.2d at 120, 213 Cal. Rptr. at 217.

the goal of accident reduction, surely the licensor is in a better position than the lessor to ensure the safety of the premises. He is also in as good a position to meet the second goal of strict liability, the distribution among society of losses due to accidents as a cost of doing business.

In any event, licensors of products are already held strictly liable. And in view of *Becker*, the extension of strict liability to licensors of premises would hardly constitute an unreasonable or unwarranted development in the law of torts. On the contrary, application of strict liability wherever it would promote safety and loss distribution would benefit society and should be welcome. Consistency, fairness, and the need for safety in products designed for public use require the even-handed application of the doctrine of strict liability.

F. Conclusion: The Doctrine's Limitations

The fact pattern in *Hahn* may be seen to represent the outer limit of the strict liability expansion proposed here. But while a much stronger case can be made for injuries resulting from defective restaurant chairs or other defective products, as has been shown, Hahn should nevertheless have been held strictly liable for the injuries caused by the falling tree. The reader should not conclude, however, that this Note argues for the application of strict liability to all business establishments. Under the extension proposed here, business establishments that do not invite the public to their premises, such as business offices and manufacturing plants, would not be subject to strict liability, but rather to negligence law, like any other landowner under the principles of *Rowland v. Christian.* While business establishments that have no wish to attract the public may be in a better position to acquire insurance and to spread the cost of accidents than an apartment dweller or home owner, imposing strict premises liability on such businesses would not necessarily reduce the risk of accidents to the *public.*

One should not forget that strict liability was originally imposed on manufacturers primarily because they increase the risk of accidents to the public by putting defective products on the market, and only secondarily because once such accidents occur, it makes more sense to place the burden of the costs on the party who created the risk and who is in a better position to spread the cost, rather than on the injured party, who bears the cost alone and is powerless to protect himself. That the doctrine of strict liability was designed to reduce the incidence of accidents to the public at large is more than

evident from Justice Traynor's continual references to the *public* in his *Escola* opinion, of which the following is one of many examples: "It is to the *public* interest to prevent injury to the *public* from any defective goods by the imposition of civil liability generally."[136] If availability of insurance alone were the deciding consideration, then nearly everyone today would be held strictly liable for injuries due to accidents in their property whether or not they created the hazard or in any way contributed to the accident.[137]

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136. *Escola*, 24 Cal. 2d 453, 464, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (emphasis added); *see also* Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

137. Some commentators of the law have nevertheless proposed that the requirement of a defect may not be desirable in strict liability cases because it frustrates both the policies of accident reduction and risk distribution. For example, Professor Ursin believes that the doctrine of strict liability should be available to "a customer or a visitor to a business enterprise who is injured when a stairway railing collapses or a chair gives way or where a person slips and falls because of a banana peel on the floor." Ursin, *supra* note 108, at 821. He also would hold a department store which provides customers with escalators strictly liable even absent a defect because "persons often trip and fall while getting off escalators. These injuries are a foreseeable consequence of holding a business premise open to the public, yet it is difficult to say that escalators are defective per se." *Id.* at 828 n.38. But people also trip and fall while walking down stairs with no defects. In other words, accidents for which no one is to blame do happen, and it would be unfair to hold business establishments strictly liable when their only contribution to plaintiff's injuries is that they allowed him to use their escalator or stairs.

Citing Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 461 (1972) and Page Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 34 (1973), Professor Ursin also uses the argument that negligence is probably present when a product is defective to support the position that the requirement of a defect is simply a "short cut" to negligence, a way of assuring that manufacturers are liable for their negligence. From this it follows that since negligence law plays no part in strict liability, then neither should the requirement of a defect.

But the premise that negligence is necessarily involved in the manufacturing of all defective products has its flaws. Manufacturers do not have the benefit of hindsight when assessing the safety of a product before it is manufactured. There may be products which are defective not because of an error in judgment, as was the case in *Becker* and *Hahn*, or a mistake in design that could have been prevented, as in Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), but simply because the product was manufactured at a point in time when its technology had not yet revealed its potential flaws or because an unreasonable effort would have been required to expose the flaw. Such manufacturers cannot possibly be considered negligent, and again it would be unfair to hold them strictly liable for defects which they could not have possibly anticipated, corrected, or warned the public about. Application of strict liability to all manufacturers regardless of whether a defect caused the injury would promote the risk distribution policy and it might even reduce the incidence of accidents, but it would do so at the cost of chilling the development of innovative products, indeed perhaps of any products that are connected with injury, such as motorcycle helmets. It is therefore not surprising that the California Supreme Court has already held that in the case of drugs, manufacturers are not strictly liable even for design defects, but only for failure to warn of dangers they knew or reasonably could have known about at the time the drug was released. Brown v. Superior Court, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988). While this position is more tenable for drugs than for consumer goods in general, holding all manufacturers or all business establishments strictly liable irrespective of the presence of any defect may prove too costly to society, notwithstanding the value of compensating victims.

But such a philosophy would foster an attitude of carelessness rather than carefulness on the part of the ordinary person when entering someone else's property. It might even encourage unreasonable or reasonable risk-taking since a business establishment that is strictly liable may be required to pay a significant amount for an accident that is largely the fault of the victim.[138] While everyone who is in a position to prevent accidents to the public should be encouraged to do so, individuals should not be encouraged to abandon prudent and responsible behavior.

For these reasons, the possibility of reducing the risk of accidents to the public, not the possibility of having the costs of accidents covered by insurance, should be the paramount factor in determining whether strict liability applies. Indeed, focusing solely on the risk distribution factor of the strict liability equation would go far in promoting the very irresponsible attitudes that the doctrine was

138. While the California Supreme Court refused to allow the absolute defense of contributory negligence in strict products liability causes of actions in Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972), it later backtracked and extended the principle of comparative fault to strict liability causes of action. Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). It is important to note that plaintiff's negligence, based on the objective standard of the reasonable, prudent person, is a factor in the comparative fault equation. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). And by allowing the application of comparative fault in strict liability causes of action, the court, in essence, made it possible to counterbalance manufacturer's responsibility for the injury with plaintiff's negligence in determining the extent of plaintiff's recovery. *Daly*, 20 Cal. 3d at 733, 575 P.2d at 1166, 144 Cal. Rptr. at 384. The *Daly* court reasoned that strict liability is beyond negligence but less than absolute liability. For example, a manufacturer cannot be held strictly liable when the injury occurs from an unforeseeable use of the product.

Because the defense of unreasonable implied assumption of the risk (UIAR) was equated with the doctrine of contributory negligence and made part of the comparative fault framework, Li v. Yellow Cab Co., 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. 875, (1975), it appears that UIAR is also available as a partial defense in strict products liability cases where comparative fault is being applied. The availability of the absolute defense of reasonable implied assumption of the risk (RIAR) in negligence and strict liability cases, however, remains unknown. There is a split among the lower courts as to its survival after *Li* in negligence actions. Segoviano v. Housing Authority, 143 Cal. App. 3d 162, 174-75, 191 Cal. Rptr. 578, 587 (1983) (the defense of RIAR no longer exists). *Contra* Ordway v. Superior Court, 198 Cal. App. 3d 98, 102, 243 Cal. Rptr. 536, 538 (1988) (RIAR is available as a complete defense). It is therefore conceivable that the California Supreme Court may uphold RIAR as a complete defense in negligence suits, but make it part of the comparative fault system in strict liability causes of action. This would make sense given that RIAR works to relieve the defendant of his duty of reasonable care, a result which for public policy reasons should play no role in strict liability cases where defects are present. Consequently, landowners or occupiers who are strictly liable may be held to be somewhat at fault if the condition of the property in any way contributed to the accident even when the accident was due to a reasonable or unreasonable risk on the part of plaintiff.

designed to prevent. In short, because only commercial establishments that attract the public are in a position to reduce the risk of accidents to the public, only they should be held to the high standard of strict liability.[139]

From this conclusion it follows that not all licensees should have a right of recovery based on strict liability for injuries incurred in defective premises.[140] Guests of private residences or business enterprises where the public is not invited should not be allowed to recover under strict premises liability. Again this is because the injury occurred in a private setting where the policy of strict liability does not apply. For this same reason, not all invitees, but only those who conduct business in commercial establishments that attract the public, should be allowed to pursue a strict premises liability cause of action.

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139. Professor Ursin, writing ten years before *Becker*, predicted the adoption of strict premises liability. Ursin, *supra* note 108, at 826. He saw *Rowland* and *Greenman* as intermediate steps in the evolution of enterprise liability, which he believed would eventually culminate in the extension of strict liability to all defective business premises. *Id.* at 821-27. From his perspective, "the policies of accident reduction and risk distribution demand that the business enterprise be strictly liable for harms caused by defective premises." *Id.* at 821.

In his argument, Professor Ursin distinguishes homeowners and apartment dwellers from business enterprises. While business enterprises are "almost certain to be protected by insurance, and the cost of this insurance is properly a cost of the business itself," homeowners and apartment dwellers are not. *Id.* at 826 n.34. Imposition of strict liability on individuals may also be objectionable to some on fairness grounds. This, along with the notion that imposing strict liability would also encourage business enterprises to minimize accident costs, leads him to the conclusion that "additional safety and liability burdens are more easily justified in the case of business enterprises than in the case of homeowners and apartment dwellers." *Id.* at 826. Thus, the prevalence of insurance seems to be a controlling factor in Professor Ursin's strict premises liability framework.

As has been discussed above, however, strict liability cannot be justified solely on the grounds of risk distribution. The extent to which the business enterprise places the public at risk of injury from defective premises or products should be the guiding principle. For this reason, it is important to make the distinctions among business enterprises discussed above. Professor Ursin recognized that this presented some line-drawing problems but felt these were insignificant. Entities which should be subject to strict liability "create a reasonable expectation of safety in persons who enter their premises, and they are in a position to safeguard against accidents and to distribute those accident losses which, nevertheless, do occur." *Id.* at 827 n.37. To this it should be added that only those enterprises that put the public at risk should be held strictly liable. All others, though they may have the wherewithal to buy insurance, are in the same position as apartment dwellers regarding the reduction of accidents to the public and should therefore be similarly treated.

140. As *Garcia* demonstrates, however, all commercial licensees of products can and should recover for injuries due to defective products. This is because while not all licensors of premises make their premises available to the public (for example, homeowners only furnish their social guests with licenses to enter their homes; *see supra* note 43), all commercial licensors of products do make their products available to the public. From this perspective, the distinction drawn here between commercial licensors of products and non-commercial licensors of premises regarding the application of strict liability can be easily supported.

This is not to say that landlords of shopping malls or other commercial buildings should be excluded from the burdens that should be imposed on all whose business enterprises affect public health and safety. As was explained in Part II, there appears to be no justification for holding landlords of residential apartment buildings, but not commercial buildings, strictly liable for injuries sustained in common areas under their control. As long as one commercial tenant of the building is attracting the public and provides the public with access to the building's common areas, the commercial landlord who is in control of the common area should be just as responsible for accidents incurred on those premises as the commercial tenant should be for accidents incurred in the leased premises which are under his control. Of course, commercial landlords and tenants are free to contract among themselves as to who shall be in control of and thus responsible for common areas. But whoever accepts this responsibility should also be held strictly liable for any accident incurred due to defective conditions. The increase in risks to public health and safety posed by the ever expanding use of technically sophisticated products and premises requires no less.

Those who oppose this expansion of strict liability for fear of the rise in litigation that it may produce should recall that strict liability can only be imposed for defective products and that this Note supports its expansion to *defective* premises only. Again, this is because imposing strict liability for accidents which the commercial establishment has little chance of preventing would not further strict liability's goal of accident reduction.[141] And as has been shown above, the widespread availability of insurance coverage for all types of accidents may indeed promote the goal of spreading the costs of injury throughout society as well as lighten the financial burden of injured parties. But it may also provide incentives for carelessness that would be undesirable and that would probably be more costly in the long run. Thus, even commercial establishments that are open to the

141. It is clear that the doctrine of strict liability provides an added incentive to reduce the risk of accidents. Negligence law is inadequate in reducing the risk of injury to the public because the difficulty in proving negligence often defeats negligence lawsuits, and this in turn deters injured persons from initiating such lawsuits. Strict liability amends this problem by providing a remedy for injured persons and a safety incentive to manufacturers without the need to prove negligence. But this is not to say that the goal of risk reduction would be best served by applying strict liability as broadly as possible. Applying strict liability in cases where the defendant business has no control over the cause of the accident (such as a shopper slipping on liquid spilled by another shopper a few seconds earlier) would not reduce the risk to the public because the business cannot prevent the accident regardless of the incentive.

public should not be subject to strict liability for accidents caused by factors beyond their control.[142] In those situations, negligence law, with its traditional requirement of some measure of fault, would be the fairer and more appropriate liability rule to apply.

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142. From this perspective, there is no basis for adopting strict liability in the case of Brown v. San Francisco Ball Club, 99 Cal. App. 2d 484, 222 P.2d 19 (1950), discussed earlier. Plaintiff in *Brown* was apparently injured by a foul ball at a baseball park. Her baseball injuries were not the result of a defect in the ball or the park. *Id.* at 485-86, 222 P.2d at 20. However, one could argue that the baseball park may be considered defective, much like the shower door in *Becker*, since the park owner could have installed screens in front of all the seats to ensure the safety of all the fans. But in contrast to plaintiff in *Becker*, who would have preferred a tempered glass door, baseball fans, in general, probably would not prefer a fully screened park— many fans enjoy the opportunity to catch a batted ball, and this opportunity is one of the reasons for coming to the game. This helps explain why park owners who provide as many screened seats as fans can reasonably be expected to call for on an ordinary occasion meet their duty of care under negligence law. *Id.* at 487, 222 P.2d at 21. Had the victim's injury in *Brown* resulted from a defect in her seat, however, strict liability should have applied. In that situation, the goals of accident reduction and risk distribution would have been served by adopting strict liability.